

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 16-467**

**CHRISTINA STEVENS, Trustee of the
LIGHTHOUSE REALTY TRUST,
Plaintiff**

vs.

TOWN OF BOURNE ZONING BOARD OF APPEALS , et al.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF JUDGMENT

The plaintiff, Christina Stevens, as Trustee of the Lighthouse Realty Trust, brings this action, seeking to annul the September 14, 2016 decision of the Town of Bourne's Zoning Board of Appeals, ordering her to cease and desist permitting renters of her property from conducting weddings and other functions on her property. On August 22, 2018, a jury waived trial was conducted before this Court. The last of the post-trial briefs was filed on September 14, 2018.

FINDINGS OF FACT

1. The plaintiff, Christina Stevens, as Trustee of the Lighthouse Realty Trust ("LRT"), is the owner of property located at 0 and 1 Lighthouse Lane, Wing's Neck, in Bourne, Massachusetts. 0 Lighthouse Lane consists of vacant land, and 1 Lighthouse Lane contains a three-bedroom dwelling with an attached light tower. The property is located in the R-80 residential district in Bourne, which allows for use as a single family dwelling, along with

customary accessory uses.

2. The defendant, James F. Molloy, is the Trustee of 2 Westview Street Realty Trust, which owns 2 Westview Street in Bourne. He seasonally resides with his family at that address.

3. That property consists of single-family residence situated on 11,573 sq. ft. in the same residential zoning district as the plaintiff's property.

4. Both Molloy's property and the LRT property are located within a private residential community, known as "Lighthouse Point."

5. The plaintiff does not reside at either house at 1 Lighthouse Lane. She advertises her property for rent, and although she does not expressly advertise it for wedding purposes, her website contains frequently answered questions which indicate that functions are permitted under certain circumstances.

6. Third parties who have rented the LRT property have held events, including weddings on the premises. According to one of the neighbors, since 2005 there have been 21 weddings and three other events such as clambakes. At least one neighbor has also held a wedding reception, and other events, including an annual Fourth of July party at the Molloy home.

7. There are 13 houses with 10 families on the Neck. The weddings have resulted in increased traffic, parking congestion, trucks delivering food, music and noise.

8. The plaintiff does not accept additional payment from renters who choose to hold events on the property, and she is no manner involved the planning, preparing or hosting of such events.

9. By certified letter, dated January 15, 2013, the Town of Bourne zoning enforcement

officer, Roger Laporte, informed Stevens that the use and marketing of the Lighthouse property for weddings constituted a commercial use, which was unlawful under the Town's zoning bylaws, and to cease and desist all such use.

10. On or about June 25, 2015, the Town of Bourne, commenced an action through Mr. Laporte against LRT in the Massachusetts Land Court, Docket #15MISC0002323(HPS) requesting that the Court issue: (a) a declaratory judgment declaring that LRT is prohibited by the Bourne Zoning Bylaw from utilizing the premises for commercial purposes, including offering to rent and renting the premises for receptions, including wedding receptions; (b) a temporary restraining order prohibiting LRT from utilizing the premises for commercial purposes, including offering to rent and renting the premises for receptions, including wedding receptions; and (c) a preliminary injunction enjoining LRT from utilizing the premises for commercial purposes, including offering to rent and renting the premises, including wedding receptions.

11. Following Case Management Conference held on August 27, 2015, the Land Court issued an order referring the Land Court action to dispute resolution screening.

12. On November 20, 2015, the parties to the Land Court action, along with several owners of neighboring properties, attended a mediation to resolve their dispute short of a protracted litigation. All in attendance offered their opinions. Following the mediation, the parties to the Land Court action continued settlement negotiations. Stevens, through counsel, submitted a proposed agreement for the resolution of this action. She anticipated that there would be a counterproposal from the neighbors, but none was filed.

13. Molloy moved to intervene in the lawsuit between the Town and Stevens, but said motion was denied by Land Court on April 13, 2016. The Land Court judge, at the time of

denying Molloy's request to intervene, noted that "if settlement is reached, as the parties indicate is likely to occur, allowing the continued use of the property in the manner for which zoning enforcement was sought, Mr. Malloy's interest may not be adequately represented by the Town of Bourne. In such case, Court directed plaintiff to direct the Building Inspector, with respect to any decision vacating, annulling or otherwise modifying the cease and desist order, to provide notice of same to Mr. Molloy, as well as any other direct abutters to Defendant [Stevens'] property."

14. At a Selectmen's meeting on or about May 27, 2016, the Selectmen voted to accept Stevens's proposal, and on June 2, 2016, a formal agreement was entered into between Stevens and the Town of Bourne, in full settlement of the dispute. This agreement was approved and signed by the Board of Selectmen after public hearing.

15. Pursuant to this agreement, the parties agreed to the following:

(a) a "function" shall be an event in excess of twenty-five (25) guests hosted by renter of the premises; a "renter" shall be an individual or individuals occupying the Property pursuant to a written rental agreement.

(b) LRT agrees to limit the number of the functions on the property to four (4) functions per year: one per month for the months of May, June, September, and October to limit the number of guests to one hundred (100).

© LRT agrees to require any renter of the property who holds a function to clean the area following the function; should any renter fail to do so, LRT will ensure the premises is free from debris after a function.

(d) LRT agrees to discuss with any renters prior to a function to establish the property

lines to which the guests are to remain during functions;

(e) LRT agrees to require entertainment at renters' functions to be shut down at 10 p.m.;

(f) LRT agrees to require that guests of any function be prohibited from using the beach; however, any renter shall be permitted to use the beach on any day during his/her rental period;

(g) LRT agrees to require a detail officer for any function that exceeds fifty (50) guests and further agrees to instruct the hired detail police officer as to the parameters that the guests are allowed to visit during the function, where cars are to be parked, and also to make clear that the beach is off limits for guests during functions.

(h) LRT agrees to notify the Town Administrator in writing 30 days in advance of any function which will exceed fifty (50) guests.

(i) the Town of Bourne agrees to dismiss the Massachusetts Land Court civil action with prejudice; and

(j) the Town of Bourne agrees to vacate the current (January 15, 2013) Cease and Desist Order on the property and to substitute in its place a cease and desist order that reflects terms of this agreement.

16. As a result of the agreement, on or about June 8, 2016, the parties filed a stipulation of dismissal dismissing the Land Court action with prejudice, without costs and with all rights of appeal waived. The plaintiff thought that this dispute was over as a result of this decision. Indeed, on June 23, 2016, in a letter signed by Mr. Laporte, the Town incorporated the terms of the agreement into a new cease and desist order replacing the prior order, and notified Molloy of his right of appeal under G.L. c. 40A.

17. On July 8, 2016, Molloy filed an appeal of the revised cease and desist order, pursuant to § 8 of Chapter 40A.

18. Stevens did not appear at the public hearing on this appeal on September 7, 2016, before the Town of Bourne Board of Appeals, believing that this matter had been resolved. In the interim, she had four weddings taking place at her property since the decision. The police were detailed once, but denied requests on several other occasions for details.

19. Following the public hearing, the Town Board of Appeals, on September 14, 2016, voted to grant Molloy's appeal, and overturned the 2016 enforcement order, substituting it with the 2013 enforcement order. It does not appear from the Board's decision that any new facts or information was before the Board than those that were raised and considered by the parties to the Land Court action (other than the settlement agreement), and presented during the mediation at which Stevens' neighbors appeared and participated.

20. Stevens had not appealed the issuance of the cease and desist order issued in 2013 to the Bourne Board of Appeals.

21. On or about October 4, 2016, LRT filed its complaint in this action, appealing the Board of Appeals September 14, 2016 decision. To date, the building inspector has not issued a new enforcement order.

22. Stevens continued to permit weddings to be conducted on the property after the issuance of the 2016 cease and desist order.

CONCLUSIONS OF LAW

The plaintiff argues that the defendant Molloy, as a citizen of the Town, and the Town

itself, was barred from any further action after the entry of a stipulation of dismissal in the Land Court and the resultant entry of a new cease and desist order, based on principles of *res judicata*. "The doctrine of [*res judicata* or] claims preclusion makes a valid final judgment conclusive on the parties and their privies and bars all further matters that were or should have been adjudicated in the action." *Heacock v. Heacock*, 402 Mass. 21, 23 (1988). This doctrine has three elements: (1) a prior final judgment on the merits; (2) sufficient identity of the causes of action; and (3) identity or privity of the parties. See *Acciavatti v. Professional Serv. Group, Inc.*, 982 F. Supp. 69, 80 (D. Mass. 1997). A stipulation of dismissal with prejudice as occurred in this case, constitutes "an adjudication on the merits as fully and completely as if the order had been entered after trial" for purposes of *res judicata* and collateral estoppel. *Gaffe v. Sullivan*, 1996 WL1186788 *2 (Mass. Super. Ct. Mar. 21, 1996), citing *Boyd v. Jamaica Plain Co-op Bank*, 7 Mass. App. Ct. 153, 157-158 n.8 (1979).

Relying on *Morganelli v. Building Inspector of Canton*, 7 Mass. App. Ct. 475 (1979), the plaintiff argues that Molloy's interests were fully represented in the Land Court action, and, therefore, he was barred from further relief in the Zoning Board of Appeals. *Morganelli* applied the doctrine, sometimes referred to as the "doctrine of virtual representation," see *Matter of Liquidation of American Mut. Liability Ins. Co.*, 417 Mass. 724, 735 n.8 (1994), that a private individual whose interest in the enforcement of zoning laws has been represented in previous litigation by a public agency or official and who does not have rights specifically granted by the statute is thereafter barred from instituting his own litigation. In *Morganelli*, however, the Court noted that the plaintiffs had "no direct private right at all." 7 Mass. App. Ct. at 485. The Court further recognized that the *Morganelli* plaintiffs were not pursuing their limited statutory rights

under c. 40A, § 17. *Id.* at 485 n.16. See *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 18 Mass. App. Ct. 632, 635-636 & n.5 (1984).

In this case, once the new cease and desist order entered in 2016 after settlement and dismissal of the Land Court action, the defendant Molloy exercised his statutory rights under Chapter 40A, and, appealed the new order entered into as a result of the settlement. Therefore, he was not barred from that action by doctrine of claim preclusion. Indeed, the right of Molloy to pursue this appeal was explicitly recognized by the Land Court at the time it denied Molloy's motion to intervene.

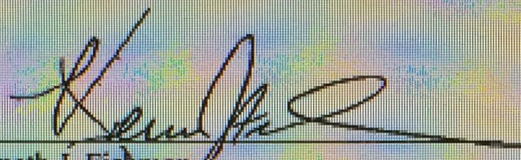
This Court is concerned about the conflicting decisions in this case, and the apparent unenforceability of a Land Court decision and the contractual obligations incurred by the Town by virtue of the settlement agreement. Even the Board of Appeals in its September 2016 decision acknowledged the potential conflict. But, as the Board noted, the abutters had rights as aggrieved parties under c. 40A, who had been denied the opportunity to intervene in, and be bound by the Land Court action. See *Barkan v. Brown*, 2017 WL 5706108 (Mass. Land Court Nov. 27, 2017).

This Court further finds that Zoning Board of Appeals ultimate determination that the plaintiff's use of the property is not an accessory use allowed within the residential district is not an arbitrary and capricious decision. While no one contests that the rental of these properties is permitted, and that at least one wedding has occurred on another property, as well as annual parties at a different home, this Court cannot substitute its judgment for that of the Board of Appeals. *Caruso v. Pastan*, 1 Mass. App. Ct. 28 (1973). Although at least one other wedding had taken place in the neighborhood and annual gatherings also occurred, accessory use could have been determined not to be customary or incidental to the residential use. See *Bourne*

Zoning By-law Section 2220 and Section V definitions. Accordingly, there is no basis upon which to find that the decision of the Zoning Board of Appeals must be annulled.

ORDER OF JUDGMENT

Based on the foregoing, it is hereby **ORDERED** that judgment shall enter for the defendant and against the plaintiff.

A handwritten signature in black ink, appearing to read 'Kenneth J. Fishman', is written over a horizontal line.

Kenneth J. Fishman
Justice of the Superior Court

DATED: November 28, 2018.